

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 20-0482

A.C.I. CONSTRUCTION, LLC,

Plaintiff/Appellant/Cross Appellee,

v.

ELEVATED PROPERTY INVESTMENTS, LLC,
LEASE OPTION SOLUTIONS, LLC, WESTERN BUILDING
CENTER, JUSTIN NORBERG, NORBERG ELECTRIC, LLC,
MONTANA DIRT WORKS,*Defendants/Appellees/Cross Appellant*

**APPELLEE/CROSS APPELLANT'S ANSWER
AND CROSS APPEAL BRIEF**

On Appeal from the Montana Eleventh Judicial District Court
Flathead County
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STATEMENT OF THE ISSUES

1. Did the District Court err by concluding LOS had lien priority when A.C.I.'s work was not submitted and approved through the particular process and budget set forth in the loan documents?
2. Did the District Court err by concluding A.C.I. could pursue an unjust enrichment claim when A.C.I. had other remedies?

STATEMENT OF THE CASE

This dispute arises out of a house flipping project gone wrong. In 2017, Elevated Property Investments, LLC (“EPI”) borrowed \$252,000 from lender Lease Option Solutions, LLC (“LOS”) to buy and renovate a home in Kalispell, Montana. Dkt. 104, Findings of Fact ¶ 9 (Sept. 21, 2020). The Trust Indenture, Promissory Note, and Renovation/Construction Holdback Draw Request Requirements (the “Loan Documents”) specified \$88,860 of the loan was for construction, and laid out a specific process for EPI to follow in order to receive the construction loan funds, including submitting proof of work and obtaining lien waivers. *Id.* at ¶ 11; Appendix Ex. A, Trust Indenture; Appendix Ex. B, Promissory Note; Appendix Ex. C, Renovation/Construction Holdback Draw Request Guidelines; Appendix Ex. D, Supp. Dec. of David Ruch ¶¶ 7-13.¹

In January of 2018, A.C.I. Construction, LLC (A.C.I.) and EPI entered into an agreement for A.C.I. to act as a contractor on the project. *Id.* at ¶ 12. While some of A.C.I.'s work was paid for by LOS under the construction loan, LOS was unaware that A.C.I. and EPI had agreed to expand the work beyond what LOS

¹ Appendix Exhibits A-E were originally submitted to the District Court with Dkt. 48, LOS’ Statement of Material Facts (Nov. 25, 2019).

approved—and what could be paid for by the construction loan. *Id.* at ¶¶ 24-29. LOS released the construction loan funds as it had agreed to do under the Trust Indenture, including receiving lien waivers from contractors and subcontractors, until the loan money ran out. *Id.* at ¶ 35. Ultimately, EPI did not pay A.C.I. for \$93,650 of work A.C.I. performed, but that work was not approved by or submitted to LOS. *Id.* at ¶ 56.

A.C.I. filed a construction lien and brought this action against Defendants. *Id.* at ¶¶ 17-18; Dkt. 1, Verified Compl. to Foreclose Construction Lien, Determine Priority of Lien, and for Damages and Attorney Fees (Feb. 5, 2019). LOS subsequently filed a motion for summary judgment on the issue of lien priority, which the District Court granted, because the work A.C.I. sought payment for was beyond the scope of the Loan Documents. *See* Appendix Ex. G, Dkt. 77, Order and Rationale on Mot. Summ. J. (Mar. 13, 2020). In the same Order, the District Court denied LOS' other motion for summary judgment on A.C.I.'s unjust enrichment claims. *Id.*

After due and appropriate notice, LOS held a trustees' sale on July 1, 2019. Findings of Fact at ¶ 38. LOS submitted a credit bid for the amount owed at the time of the foreclosure sale. *Id.* at ¶ 39. A.C.I. did not appear at the sale. *Id.* As LOS made a credit bid, no funds were paid at the sale. *Id.*

The case proceeded to a bench trial in August of 2020 on A.C.I.'s unjust enrichment claim, where the parties presented evidence and testimony over two days. Dkt. 104, Findings of Fact Conclusions of Law at 1 (Sept. 21, 2020). At the

end of trial, the District Court ordered LOS to pay A.C.I. for the remaining labor and material A.C.I. was owed for the renovation, in the amount of \$93,650. Dkt. 104, Order ¶ 2 (Sept. 21, 2020).

A.C.I. is now appealing from the District Court’s lien priority determination on summary judgment and its corresponding Findings of Fact and Conclusions of Law. LOS is cross-appealing from the District Court’s denial of its motion for summary judgment on A.C.I.’s unjust enrichment claim which argued A.C.I.’s equitable claims should be dismissed because it has legal remedies which precludes any equitable claims. *See* Appendix Ex. G.

BACKGROUND

Appellant A.C.I. is a Montana business corporation with its principal place of business in Flathead County, Montana. Findings of Fact at ¶ 1. Defendant EPI is a Montana Limited Liability Company with its principal place of business in Missoula County, Montana. *Id.* at ¶ 2. EPI owned real property in Flathead County, Montana, that is subject to the construction lien in this matter (the “Property”). *Id.* Appellee LOS is a Limited Liability Company with its principal place of business in Arapahoe County, Colorado. *Id.* at ¶ 4.

On September 15, 2017, EPI purchased the Property. *Id.* LOS entered into a Promissory Note and Trust Indenture with EPI and provided financing for the purchase of the Property with a loan in the amount of \$252,000. *Id.* at ¶¶ 9-10. The Trust Indenture was appropriately filed with the Flathead County Clerk and Recorder on September 18, 2017. Appendix Ex. E, Dec. of D. Ruch ¶ 5 (Oct. 10,

2019); Compl. at ¶ 12.

While the majority of the loan went to the Property's purchase price, \$88,860 was allocated to a construction hold back (the "Construction Loan"). Findings of Fact at ¶ 11. The scope of the Construction Loan was limited, detailed, and in writing in the Loan Documents; LOS did not agree to fund any construction work beyond what was written in the loan, including anything beyond the loan amount, and the parties agreed to a detailed process before any construction draws could be made. Appendix Ex. D at ¶¶ 7-13; Appendix Ex. C. Specifically, EPI was required to show the expense was part of the limited construction financing and either provide a lien release from the contractor or provide proof that the materials were paid for. *Id.*

On January 8, 2018, A.P.I. and EPI entered into a contract, whereby A.P.I. agreed to act as a contractor to complete real estate improvements on the Property. Findings of Fact at ¶ 12. Under this contract, A.C.I. performed real estate improvements including labor and materials in the amount of \$141,000, and EPI paid A.C.I. \$47,350. *Id.* at ¶ 56.

Consistent with the Loan Documents' requirements and over the course of the construction, LOS required and received a lien release, proof of payment, and conducted an inspection of the work before releasing any construction funds. *Id.* at ¶ 31; Appendix Ex. D at ¶¶ 10, 13. LOS took this action to protect its lien position by making sure all contractors and materials which were part of its Construction Loan were paid and could not file a lien. Appendix Ex. E at ¶ 10. In total, LOS paid out \$82,181.80 and held back just under 10% of the funds (\$6,678.20).

Findings of Fact at ¶ 35.

Part of A.C.I.'s payment came from the Construction Loan after EPI submitted proof of the work to, and got approval from, LOS consistent with the Construction Loan requirements set forth above. *Id.* at ¶ 31. Indeed, a majority of the Construction Loan proceeds were distributed to A.P.I. and its subcontractors. *Id.* Specifically, A2Z Electric, Ogle Heating & Cooling, and Big Bear Plumbing were A.C.I.'s subcontractors who performed work on the Property and were paid \$42,491 from the Construction Loan. *Id.*; Appellant's Opening Br. at 14. Likewise, A.C.I. itself was paid \$15,397 from the Construction Loan. Findings of Fact at ¶ 31. However, A.C.I. and its subcontractors also performed additional work for which no draw requests were made to LOS, nor would they have been given, because those projects were outside of the construction budget that LOS had agreed to lend. *Id.* at ¶¶ 24-29.

The District Court specifically found that the LOS protected its trust indenture position by going through this process and directly requiring lien releases prior to releasing Construction Loan funds to the amount of the Construction Loan:

31. LOS paid the following entities and obtained lien releases from the following:

Date of Lien Release	Contractor Name	Amount of Lien Release	Exhibit
11/06/17	TNT Restoration	\$5,421.00	BM
11/27/17	Ogle Heating & Cooling	\$8,000.00	AP
12/14/17	K&T Cabinets	\$2,988.80	BO
1/18/18	ACI Construction, LLC	\$6,200.00	BQ
2/16/18	ACI Construction, LLC	\$9,197.00	BP
1/17/18	Elevated Property Investments	\$17,934.00	L
2/20/18	Ogle Heating & Cooling, Inc.	\$13,075.40	AQ
2/20/18	A2Z Electric	\$7,742.50	AO
2/20/18	K&T Cabinets	\$6,612.60	BX
2/22/18	Big Bear Plumbing	\$13,674.14	BS
	TOTAL:	\$82,845.44	

Id. at ¶ 31.

EPI ultimately defaulted on the terms of LOS' loan and also refused to pay A.C.I. for the remaining materials and labor it provided. *Id.* at ¶¶ 16, 36. In total, EPI still owed A.C.I. \$93,650. *Id.* at ¶ 56. A.C.I. recorded a construction lien on July 26, 2018 in Flathead County and recorded an amended construction lien to correct the amount of interest claimed on October 5, 2018. *Id.* at ¶ 17. A.C.I. also recorded a second construction lien for additional construction services and materials on October 10, 2018. *Id.* at ¶ 18.

Thereafter, A.C.I. brought this action against EPI, LOS, Western Building Center, Justin Norberg, Norberg Electric, LLC, and Montana Dirt Works. Dkt. 51, Amd. Compl. (Oct. 22, 2019). Against EPI, A.C.I. alleged breach of contract and unjust enrichment. *Id.* at ¶¶ 21-32. Against LOS, A.C.I. alleged unjust enrichment, asserting that "A.C.I. is entitled to the reasonable value of the work it has done and the labor and materials it provided to [LOS]." *Id.* at ¶¶ 23-32. Additionally, A.C.I. requested the District Court determine its construction lien had priority over the construction loan portion of LOS' Trust Indenture. *Id.* at ¶¶ 27-29.

In October of 2019, LOS filed a Motion for Summary Judgment on the issue of lien priority. Dkt. 47, LOS' Mot. and Brief for Summ. J. (Oct. 11, 2019). Specifically, LOS argued it had priority because the Trust Indenture did not have the particular purpose of paying for the work A.C.I. completed that was not submitted to or approved by LOS and was beyond the amount of the Construction Loan. *Id.* at 6-7. In response, A.C.I. agreed that LOS had received lien releases and

proof of payment before releasing all of the funds, but it argued, relying on affidavits of various subcontractors it hired, that LOS should not have priority because it did not release payment to the correct contractors. Dkt. 56, Pl.’s Resp. to LOS’ Mot. for Summ. J. (Nov. 8, 2019). Importantly, the parties did not dispute that LOS had absolute priority on the portion of the Trust Indenture that went towards the Property’s purchase price—the only dispute was over the Construction Loan portion of funds. Appendix Ex. G at 1.

The District Court granted LOS summary judgment on the lien priority issue. *Id.* at 1-2. It reasoned LOS’ Trust Indenture was filed first and A.C.I.’s construction lien could not take priority under Mont. Code Ann. § 71-3-542 because,

The trust indenture served a limited purpose. The trust indenture provided that it was not to fund all advances for the property, rather, it was limited to the specific items listed in the loan agreement. **For this work, parties were paid, and lien releases were obtained.** The work for which ACI has filed its lien was not specified in the construction loan agreement.

Id. at 2 (emphasis added). Therefore, the District Court’s decision of what work was “particularly” included was based on what work had been approved through the specific process set forth in the Loan Documents, not what construction tasks LOS agreed to pay for. Similarly, the District Court held A.C.I.’s affidavits did not raise any issues of material fact because “the ‘paying the wrong contractor’ allegation does not change priority[.]” *Id.* Then again, as was shown at trial, LOS did pay the correct workers. Findings of Fact at ¶ 31. The issue was more that the

scope of work was beyond the amount of the Construction Loan.

In the same Order, the District Court denied a second Motion for Summary Judgment filed by LOS on the issue of A.C.I.'s unjust enrichment claim. Appendix Ex. G at 3. There, LOS had argued that because A.C.I. had a valid breach of contract claim against EPI, and because statutory remedies were available to A.C.I., A.C.I. should not be able to proceed on its unjust enrichment claims. Dkt. 67, LOS' Mot. and Brief for Summ. J. on Pl.'s Unjust Enrichment Count (Jan. 10, 2020). A.C.I. countered that although it had a contract with EPI, a judgment against EPI would be meaningless, because its sole asset was the Property. Dkt. 68, Pl.'s Resp. to Def. LOS' Mot. for Summ. J. on Pl.'s Unjust Enrichment Count at 5 (Jan. 29, 2020). The District Court ultimately held that although A.C.I. had a legal remedy against EPI, because EPI no longer owned the home, and LOS did, disallowing A.C.I.'s unjust enrichment claim would result in a windfall for LOS. Appendix Ex. G at 3.

LOS held a trustees' sale on July 1, 2019, where it purchased the Property on a credit bid for the amount owed at the time of the foreclosure sale. Findings of Fact at ¶ 39. No one other than LOS appeared at the foreclosure sale. *Id.* Thereafter, LOS received an offer to purchase the Property for \$475,000. *Id.* at ¶ 58. A month after LOS held the trustees' sale, A.C.I. received an entry of default against EPI. Dkt. 38, Entry of Default (Aug. 6, 2019).

The case was decided after a two-day bench trial in August of 2020. Findings of Fact and Conclusions of Law at 1. On September 21, 2020, the District

Court issued its Findings of Fact, Conclusions of Law, and Order, entering judgment in favor of A.C.I. and against EPI in the amount of \$137,519.10 together with attorney's fees and interest. Order at ¶ 1. Additionally, judgment was entered in favor of A.C.I. and against LOS for \$93,650, representing the work that A.C.I. did on the Property but was not compensated for. Conclusions of Law at ¶ 3; Order at ¶ 2.

STANDARDS OF REVIEW

The Court reviews appeals from summary judgment rulings de novo, applying the same criteria as the district court. *BNSF Ry. Co. v. Eddy*, 2020 MT 59, ¶ 7, 399 Mont. 180, 459 P.3d 857 (citations omitted). Summary judgment is only appropriate where no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* Once the moving party has met its initial burden, the party opposing summary judgment must present substantial evidence to raise a genuine issue of material fact, more than “speculative, fanciful, or conclusive statements.” *Id.* (citations and quotations omitted).

In reviewing a district court's exercise of its equitable powers, the Court's standard of review is set forth in Mont. Code Ann. § 3-2-204(5). Under that provision, the Court has a duty to “determine all of the issues of the case and to do complete justice.” *Kauffman-Harmon v. Kauffman*, 2001 MT 238, ¶ 11, 307 Mont. 45, 36 P.3d 408 (citation omitted). Additionally, the Court reviews “all questions of fact arising upon evidence presented in the record” to determine if the district

court's findings are clearly erroneous and if its conclusions of law are correct. *Id.*; *see also LeMond v. Yellowstone Dev., LLC*, 2014 MT 181, ¶ 22, 375 Mont. 402, 336 P.3d 345. Likewise, the Court reviews a district court's findings of fact for clear error and its conclusions of law for correctness. *Matter of M.T.*, 2020 MT 262, ¶ 17, 401 Mont. 518, 474 P.3d 820.

Finally, the Court reviews a district court's decision to grant attorney's fees for an abuse of discretion. *Wohl v. City of Missoula*, 2013 MT 46, ¶ 29, 369 Mont. 108, 300 P.3d 1119.

SUMMARY OF THE ARGUMENT

The District Court correctly determined that LOS' Trust Indenture had priority because it was filed first and Mont. Code Ann. § 71-3-542(4) does not apply to the work A.C.I. seeks payment for. Specifically, the Loan Documents set forth specific parameters to determine what particular work would be covered by the Construction Loan: (1) the work had to be within the \$88,860 loan amount, and (2) the work had to be submitted to and approved by LOS through a specific process, including obtaining lien waiver. A.C.I.'s construction lien seeks payment for work that was beyond the limited scope and amount of the Construction Loan, and therefore, the work is not within the "particular" work subject to the Construction Loan. LOS protected its priority position by appropriately limiting the amount of its loan and specifically obtaining lien releases in the amount of its

loan. A.C.I. is demanding payment from LOS for work beyond the scope of the Construction Loan. This Court should affirm the District Court's decision that LOS' Construction Loan had priority over A.C.I.'s construction lien.

In turn, to the extent A.C.I. can make an equitable claim, the District Court fashioned an equitable result well within its broad discretion by restoring A.C.I. with the benefit it conferred on the Property. The additional award of attorney fees and interest is not mandated by the law or equity. If this Court rejects LOS' argument that A.C.I. was not entitled to any damages on their unjust enrichment claim, explained in the subsequent paragraph, it should affirm the District Court's award.

Alternatively, this Court should find that the District Court erred by allowing A.C.I. to proceed on its unjust enrichment claim. Importantly, a claim for unjust enrichment "should be limited to situations in which no other remedy exists." *N. Cheyenne Tribe v. Roman Cath. Church ex rel. Dioceses of Great Falls/Billings*, 2013 MT 24, ¶ 39, 368 Mont. 330, 296 P.3d 450. Here, A.C.I. had two other valid remedies—those contained in Montana's foreclosure statutes and breach of contract against EPI. Therefore, an unjust enrichment claim against LOS is not appropriate, and this Court should reverse the District Court's award of damages in on that claim.

ARGUMENT

I. The District Court did not err by concluding LOS' trust indenture had priority over A.C.I.'s lien, and therefore, the District Court's award was equitable.

A. *The District Court correctly determined the Construction Loan had priority over A.C.I.'s construction lien under Mont. Code Ann. § 71-3-542(4).*

As the present case concerns a Construction Loan which was for both the purchase of the property as well as construction improvements, it is necessary to note Montana law gives absolute priority to a mortgage/trust indenture given for the purchase price:

Except as otherwise provided by law, a mortgage given for the price of real property at the time of its conveyance has priority over all other liens created against the purchaser, subject to the operation of the recording laws.

Mont. Code Ann. § 71-3-114. Thus, a mortgage/trust indenture given to purchase property cannot lose its priority to any subsequently filed lien. *Id.*

In a situation wherein the mortgage/trust indenture has a dual purpose of both funding the purchase as well as some construction, like in the present case, Mont. Code Ann. § 71-3-542(4) comes into play. Under that statute, a construction lien could only have priority over any construction funds if—and only if—the Trust Indenture was “made for the purpose of paying for the particular” work subject to the lien:

(4) A construction lien has priority over any interest, lien, mortgage, or encumbrance that is filed before the construction lien attaches if that interest, lien, mortgage, or encumbrance was taken to secure advances

made for the purpose of paying for the particular real estate improvement to which the lien was attached.

This split makes sense. A contractor does not get a blank check to charge whatever it wants and expect to have full and complete priority over the purchase loan. The construction priority can only, at most, extend to the amount of the loan attributable to the construction. Therefore, A.C.I.'s construction lien could never get full priority over LOS' Trust Indenture because, the parties agree, the Trust Indenture purchased the property. As such, there is no question LOS' Trust Indenture is in first position to the amount of the money allocated to the purchase price of \$163,140 (the total loan amount (\$252,000) less the amount of the Construction Loan (\$88,860)).

As to the priority for the Construction Loan portion of the Trust Indenture, to determine “the particular real estate improvement” under Mont. Code Ann. § 71-3-542(4), a court examines the language of the bank’s loan or trust indenture. *See, e.g., Signal Perfection, Ltd. v. Rocky Mountain Bank*, 2009 MT 365, ¶ 17, 353 Mont. 237, 224 P.3d 604. In *Signal Perfection*, the Court held that the trust indenture’s language indicated it was executed for the broad purpose of “securing advances for the construction of the 12th planet complex[,]” and therefore, the construction lien at issue had priority over the trust indenture. *Id.* ¶ 18.

Here, the Loan Documents were specific about what particular work was covered, and the District Court was correct that the work A.C.I. seeks payment for

is beyond that covered work. The Loan Documents reflect LOS agreed to pay for \$88,860 of work that also was submitted to and approved by LOS through a specific and detailed process, including obtaining a lien waiver. Appendix Ex. A, B, and C; Appendix Ex. E at ¶¶ 7-13. Indeed, LOS disbursed funds for all of the work that was within the budget, properly submitted, and approved by LOS. Appendix Ex. E at ¶¶ 10, 13; Findings of Fact at ¶ 31. However, the work A.C.I. seeks payment for under its construction lien was not submitted and approved pursuant to that process, and likewise, it was above and beyond the amount LOS agreed to lend. Findings of Fact at ¶ 24-29, 31.

Specifically, unbeknownst to LOS, A.C.I. engaged a structural engineer and architect to make alterations to the Property that cost more than the approved loan amount. *Id.* at ¶¶ 26-29. Likewise, A.C.I. performed work on the property that was not submitted to or approved by LOS and was beyond the Construction Loan amount. *Id.* at ¶ 29. The simple fact that A.C.I. believed EPI's assurance that it would be paid for these projects, does not mean the projects were within what LOS contracted to provide when it issued the Construction Loan. Therefore, as the District Court correctly determined, A.C.I.'s construction work was not "for the particular real estate improvement to which the lien was attached," and in turn, A.C.I.'s construction lien cannot have priority over LOS' prior filed Trust Indenture. Appendix Ex. G at 2.

As it follows, contrary to A.C.I.'s assertion, the District Court's decision on lien priority was not based on what types of construction projects (i.e. demotion, flooring, windows, etc.) were included in the Loan Documents. In fact, the District Court made no mention of specific projects in its Order and Rationale on the Motions for Summary Judgment. Rather, it concluded that the Trust Indenture was provided for specific items for which "parties were paid, and lien releases were obtained," and that A.C.I.'s projects were not included in those items. *Id.* Likewise, there is no provision in the Loan Documents that provides LOS would pay for only certain projects depending on what kind of construction work they were, so that could not have been the District Court's rationale. Appendix Ex. A, B, and C. Rather, as described above, the "particular" work covered by the Construction Loan was work that was (1) within the amount loaned and (2) approved through the specific process outlined in the Loan Documents, including obtaining a lien waiver. *Id.* Therefore, the District Court's findings of fact regarding the types of projects that were within the construction budget, *See* Findings of Fact ¶¶ 42-55, are both irrelevant to the lien priority issue and not inconsistent with the District Court's Order and Rationale on the Motion for Summary Judgment, as A.C.I. alleges. For that reason, those findings of fact should not persuade this Court to reverse the District Court (particularly since the District Court saw no inconsistency). Rather, the District Court consistently and correctly held that

because A.C.I.'s work did not meet the specific requirements set forth in the Loan Documents, that work was not the "particular" real estate improvement to which the Trust Indenture attached.

Importantly, A.C.I. does not dispute that the work it is seeking payment for was beyond the construction budget approved by LOS or that the work was not submitted to LOS through the process outlined in the Loan Documents. Rather, A.C.I. suggests the District Court ignored contested material facts provided in the affidavits of Gene Riffle, Henry Ratzlaff, Lon Hayek, Vern Schrader, Robert Wickland, and Travis Bradshaw. *See* Appellant's Appendix 3, Ex. 3-7, 2. There are two problems with this argument. First, as the District Court determined in its Order, the facts presented in those affidavits are not material to the lien priority issue. Appendix Ex. G at 2. This is because the only argument A.C.I. made below was that the referenced affidavits proved LOS did not release funds and obtain lien releases from the correct subcontractors. *See* Pl.'s Resp. to LOS' Mot. for Summ. J. at 6. However, which contractors LOS did release funds to has no bearing on whether the work that A.C.I. did was properly submitted, approved, and within the loan amount, making it a part of the "particular work" to which the Trust Indenture attached.

Second, much of the work performed by the subcontractors who provided affidavits (in particular, A2Z Electric, Ogle Heating & Cooling, and Big Bear

Plumbing) was paid out through the Construction Loan, including payment to A.C.I. Findings of Fact at ¶ 31. Or, in other words, the contractors who A.C.I. contends should have been paid, were paid. In fact, A.C.I. and the referenced subcontractors were paid \$57,888 of the \$82,181.80 LOS released. *Id.* Therefore, the affidavits only prove the fact that LOS did pay the “correct” contractors, until the work went beyond the Construction Loan amount. The District Court correctly determined the affidavits did not create a dispute of material fact on the issue of lien priority.

Finally, A.C.I.’s argument that its lien should be given priority because LOS is in a “better position” to protect itself misses an important fact. In support of this contention, A.C.I. cites *Tri-Cty. Plumbing & Heating, Inc. v. Levee Restorations, Inc.*’s holding that “the holder of a trust indenture was the party with the greatest ability to protect its interest by either withholding funds to the extent of the contemplated improvement or by requiring the landowner to obtain lien waivers.” 221 Mont. 403, 418, 720 P.2d 247, 256 (1986). But, as the District Court recognized, that is exactly what LOS did here to protect itself. Appendix Ex. G at 3. The terms of the Loan Documents provided LOS would not release funds that were not approved by it through a specific process, and further, it required ESI to obtain lien waivers before paying proceeds from the Construction Loan. Appendix Ex. D at ¶¶ 7-13; Appendix Ex. C. Further, as the District Court concluded,

In this situation LOS could not know that the owners of EPI would contract for work with ACI that was outside the projects/work listed in the loan agreement. However, ACI could find the recorded trust indenture, know that the encumbrance existed and know what it was being hired to do was not part of the work specified to be paid for by the construction portion of the loan.

Appendix Ex. G at 3. Therefore, this Court should not find A.C.I.'s lien had priority because LOS was in a "better position" to protect itself.

B. The District Court's award of \$93,650 to A.C.I. was equitable and within its wide discretion because that amount restores A.C.I. with the benefit it conferred on the property.

While LOS disputes in its cross-appeal that an equitable claim is even available to A.C.I., unjust enrichment is an equitable claim for which courts have broad discretion in determining restitution. *See Associated Mgmt. Servs., Inc. v. Ruff*, 2018 MT 182, ¶ 64, n. 22, 392 Mont. 139, 424 P.3d 571 (citing *Volk v. Goeser*, 2016 MT 61, ¶ 45, 382 Mont. 382, 367 P.378) (noting a court has "broad discretion" to "fashion an equitable result that will accomplish complete justice"). Additionally, "forms of restitution available upon proof of an unjust enrichment claim include direct restoration of the benefit conferred or gained, or imposition of a constructive trust to the same effect." *Id.* Similarly, a district court has discretion to grant or deny attorney fees:

The reasonable amount of attorney's fees awarded is left to the discretion of the district court. What constitutes reasonable attorney's fees is for the district court to determine under the facts of each case. An award of attorney's fees must be based on competent evidence.

DiMarzio v. Crazy Mountain Const., Inc., 2010 MT 231, ¶ 53, 358 Mont. 119, 243

P.3d 718 (internal citations omitted).

The District Court did not abuse its broad discretion in equity by awarding A.C.I. damages that paid for all of the work A.C.I. put into the Property. A.C.I. performed a total of \$141,000 in work, including labor and materials, on the Property. Findings of Fact at ¶ 58. EPI paid A.C.I. \$47,350 for that work, including \$15,397 from the Construction Loan. *Id.* at ¶¶ 31, 56. Therefore, A.C.I.'s outstanding balance for work performed on the Property was \$93,650—the same amount the District Court ordered LOS to pay A.C.I. Order at ¶ 2.

There is no clear error in any of these facts, and A.C.I. does not contest them. Likewise, there is no law, nor does A.C.I. suggest any law exists, that provides it must be able to recover attorney fees and interest from LOS. Indeed, as explained above, the award of attorney fees is also discretionary. Therefore, this Court should not conclude that the District Court's conclusions of law were incorrect. In short, the District Court's judgment made A.C.I. whole by restoring the benefit A.C.I. conferred on the Property. This is an appropriate remedy for unjust enrichment. *Associated Mgmt. Servs., Inc.*, ¶ 64. The District Court, after reviewing all of the evidence and hearing testimony, fashioned an equitable result well within its broad discretion.

II. Alternatively, A.C.I. did not have a valid unjust enrichment claim and therefore should not be entitled to any damages on that claim.

LOS's cross appeal concerns its January 10, 2020 motion for summary

judgment on A.C.I.'s equitable claims. LOS' Mot. and Brief for Summ. J. on Pl.'s Unjust Enrichment Count. As LOS argued, the following elements must be established in order to pursue an unjust enrichment claim:

(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit the defendant of the benefit; and (3) the acceptance and retention of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without payment of its value.

See 66 Am.Jur.2d Restitution and Implied Contracts § 11; *N. Cheyenne Tribe*, ¶ 39.

Significantly, a claim for unjust enrichment “should be limited to situations in which no other remedy exists.” *Id.* (citing *Rawlings v. Rawlings*, 240 P.3d 754, ¶ 29 (Utah 2010)). Thus, the doctrine is used to “remedy injustice when other areas of the law [can] not.” *Id.* at ¶ 36 (citing *Rawlings*, ¶ 29).

Here, because A.C.I. had both a valid remedy and a contract claim under Montana statute, it should not have been able to proceed on its unjust enrichment claim.

A. *The District Court erred in awarding A.C.I. damages for unjust enrichment when an exclusive statutory remedy existed for its claims.*

In instances where an exclusive remedy exists at law, the legal remedy, and that remedy alone, shall apply. *See, e.g., Arthur v. Pierre Ltd.*, 2004 MT 303, ¶ 27, 323 Mont. 453, 100 P.3d 987. Indeed, in *Arthur*, the Montana Supreme Court determined the Montana's Human Right Act's specific remedy relating to sexual discrimination in the employment context prevailed over all other claims arising

from the same underlying allegations, despite the plaintiff's attempt to re-characterize the claims. *Id.* Likewise, “[A] district court may only accept jurisdiction in equity when no statutory or legal remedy is available.” *Eagle Watch Invs., Inc. v. Smith*, 278 Mont. 187, 192, 924 P.2d 257, 250 (1996).

A.C.I. agrees Montana has a specific statutory system for determining the priority of real estate liens, Mont. Code Ann. § 71-3-542. Appellant's Opening Br. at 10. Accordingly, if this Court were to allow A.C.I. to make a claim against LOS for unjust enrichment, such action would completely negate the purpose of construction lien priority statutes, rendering them futile. In other words, once the District Court validly determined that LOS had priority, A.C.I. should not have been able to bring a claim in equity against LOS. Rather, A.C.I. had the remedies available under Montana's lien statutes—for example, it could have shown up at the trustee's sale and offered to buy the Property. But, it did not. Findings of Fact at ¶ 39. A.C.I. ought not to be permitted to disclaim certain areas of law in favor of equity, while at the same time taking advantage of others that are more in line with its interests.

Pursuant to Mont. Code Ann. § 71-3-542, A.C.I. had the ability to protect its lien position by appearing and bidding at the July 1, 2019, trustee's sale. There is no dispute A.C.I. had notice of the trustee's sale. It chose not to avail itself of its statutory legal remedy to bid at the sale. In doing so, once LOS' priority was

determined by the District Court’s summary judgment order, A.C.I.’s lien was foreclosed. Because there is an explicit statutory legal remedy, A.C.I. cannot claim an equitable remedy. *Eagle Watch Invs., Inc.*, 278 Mont. at 192, 924 P.2d at 260.

B. The District Court erred by allowing A.C.I. to recover on its unjust enrichment claim when it had a remedy in contract.

Further, the doctrine of unjust enrichment was “created by law in the absence of an agreement between the parties.” *Estate of Pruyn v. Axmen Propane, Inc.*, 2009 MT 448, ¶ 63, 354 Mont. 208, 223 P.3d 845 (citations omitted).

Consequently, courts in Montana utilize the doctrine “when a contract in law is implied by the facts and circumstances of the case, but no actual contract exists between the parties.” *Welu v. Twin Hearts Smiling Horses, Inc.*, 2016 MT 347, ¶ 33, 386 Mont. 98, 386 P.3d 937. The doctrine is a quasi-contract theory, meant to prevent injustice in the absence of a contract. *See Maxted v. Barrett*, 198 Mont. 81, 87, 643 P.2d 1161, 1164 (1982) (“The theory of unjust enrichment and restitution is brought into play only when no contract between the parties exists and the court implies a contract in law.”); *Total Indus. Plant Services, Inc. v. Turner Industries Group, LLC*, 2013 MT 5, ¶ 25, 368 Mont. 189, 294 P.3d 363 (citations omitted) (“Theories of quasi-contractual obligations are premised on the absence of an express contract, and as such, do not apply here.”). Thus, it has long been established that the existence of a contract precludes a claim for unjust enrichment.

Here, because A.C.I. has a contractual remedy, it should not have been able

to proceed with its unjust enrichment claim. Specifically, A.C.I. had a remedy against EPI for breach of contract and, notably, A.C.I. specifically pursued that remedy. A.C.I. and EPI had a contract whereby EPI agreed to pay A.C.I. for the work performed on the property. *See* Appendix Ex. F. However, EPI did not pay A.C.I. for all of the work it performed. Findings of Fact at ¶ 36. Based on these facts, A.C.I. brought a breach of contract claim against EPI, and indeed, it received a default judgment on that claim. Dkt. 38, Entry of Default.

Perhaps most illustrative of the problem with allowing A.C.I. to proceed simultaneously with unjust enrichment and contract claims is the fact that A.C.I. has been able to double recover. Specifically, the District Court ordered a judgment in favor of A.C.I. and against EPI for \$137,519, plus attorney fees and interest. Order at ¶ 1. At the same time, it ordered a judgment in favor of A.C.I. and against LOS for \$93,650. *Id.* at ¶ 2. A.C.I. has only ever requested, in total, \$137,519, plus attorney fees and interest. *See* Compl. at 5; Appellant’s Opening Br. at 6. Yet, the District Court awarded A.C.I. for the total labor and materials it is owed, \$93,650, from two different defendants. Order at ¶¶ 1-2. While EPI may not have current assets to pay their judgment, that by itself does not mean that A.C.I. cannot ever recover from EPI—for example, A.C.I. could pierce the corporate veil and seek recovery from EPI’s members. In short, because A.C.I. was able to pursue both contract and unjust enrichment claims for the same injury, it is now

entitled to \$231,169, plus attorney fees and costs, even though it has only ever alleged and proved \$137,519 in damages.

As emphasized above, the law is clear that an unjust enrichment claim may not stand when other remedies exist. In this case, proper contractual remedies applied between EPI and A.C.I. for the damages A.C.I. sought to recover from LOS, and therefore, the District Court erred by allowing A.C.I. to proceed with its unjust enrichment claim.

CONCLUSION

This case is not as complicated as A.C.I. makes it out to be. LOS agreed to loan EPI \$88,860 for a construction project, and it also limited the Construction Loan by specifying a process through which LOS would release the loan funds. Under a separate contractual agreement that LOS was unaware of, A.C.I. performed construction work for EPI, but that work was beyond the amount LOS agreed to lend. Furthermore, this work was not submitted and approved as was required under the Loan Document's specific parameters. Therefore, A.C.I.'s construction lien cannot have priority over the Trust Indenture under Mont. Code Ann. § 71-3-542(4).

For the same reason, A.C.I. already has valid contractual and statutory remedies to recover the damages it seeks, and LOS should not be liable under the theory of unjust enrichment. However, if this Court disagrees with LOS' unjust enrichment argument, it should find that the District Court's award was well within the broad discretion afforded by the principles of equity.

Dated this 24th day of March, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies the body of this brief contains 6,274 words, as calculated by Microsoft Word, excluding the Table of Contents, Table of Authorities, Certificate of Service and the Certificate of Compliance. This brief is double-spaced in size 14 Times New Roman font.

March 24, 2021.

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